BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of	)	
	)	DOCKET NO. 18223
[REDACTED]	)	
	)	DECISION
Taxpayer.	)	
	)	

On July 14, 2004, the staff of the Sales, Use and Miscellaneous Tax Audit Bureau (Bureau) of the Idaho State Tax Commission (Commission) issued a Notice of Deficiency Determination to [Redacted], doing business as [Redacted] (taxpayer), proposing sales tax, use tax, interest, and penalty for the period May 1, 2001 through April 30, 2004, in the total amount of $1,980.

On August 4, 2004, the taxpayer filed a timely appeal and petition for redetermination. An informal hearing was held on November 30, 2004. The Commission, having reviewed the file, hereby issues its decision.

The taxpayer operates [Redacted], Idaho. The audit staff imposed use tax on several untaxed purchases and leases of property, including rentals of several [Redacted]. It is the leases of the [Redacted] that are at issue in this case. The taxpayer did not dispute the imposition of tax on the other items, with one exception that will be discussed later.

Idaho Code § 63-3621 imposes a use tax on the storage, use, or other consumption of tangible personal property in this state. The use tax is a complementary tax to the sales tax. Every state that imposes a use tax also imposes a sales tax. Payment of sales tax on the purchase of tangible personal property extinguishes the purchaser's liability for use tax. It is undisputed that the taxpayer did not pay sales tax on the lease payments of the [Redacted]

The taxpayer argues that the [Redacted] were purchased for resale. Idaho Code § 63-3619 imposes tax only on retail sales. Idaho Code § 63-3609 states that a retail sale "means a sale for any purpose other than resale in the regular course of business…" For this reason, a retailer does not owe sales or use tax when he purchases goods that he intends to resell. This applies to lessors of tangible personal property as well as traditional retailers. The Tax Commission found, however, that the taxpayer did not rent the [Redacted] to her customers. The [Redacted] remained at all times under the possession and control of the taxpayer. The customer would enter the [Redacted] at the taxpayer's place of business. It is true that the customer had the ability to turn the [Redacted] off and on. The taxpayer could also turn the [Redacted] off and on by turning a switch located outside of the [Redacted]. The taxpayer also advised customers of how much time they could spend in the [Redacted]. Although the customer actually set the amount of time from inside the [Redacted], the taxpayer would shut the [Redacted] off herself if a customer was exposed to the lamps for longer than the recommended time. The object of the transaction, therefore, appears to be the acquisition of a [Redacted], rather than possession of the [Redacted]. The customer does not actually rent the [Redacted] any more than a moviegoer rents a theater or a golfer rents a golf course.

The taxpayer argues that paying tax on the rental of the [Redacted] amounts to double taxation because she is required to collect tax on the charge to her customers for using the [Redacted]. The Commission has consistently held that charges for [Redacted] are either an admission or fees paid for the use of tangible personal property or other facility for the purpose of recreation. Such fees are included within the definition of "sale" found in Idaho Code § 63-3612.

The Idaho Supreme Court has already addressed this issue. In *Boise Bowling Center v. State of Idaho*, 93 Idaho 367, 461 P.2d 262, (1969), the taxpayer was a bowling alley that had leased pin setting equipment. The taxpayer in that case contended that it was double taxation to require it to pay sales tax on its equipment lease since it was required to collect tax on the charge for bowling. The Court stated:

> Lastly we turn to respondents' (proprietors') contention that the imposition of the sales tax on the transaction between themselves and A.M.F. constitutes 'double taxation' since the statute also imposes a tax on the transaction between the proprietor and his customer (bowling patron). It is evident that two transactions have occurred simultaneously. The first is the proprietor's rental of the pinsetting equipment from A.M.F. The second is the sale of bowling services by the proprietor of the bowling establishment to his customers. These are two entirely distinct transactions which are being subjected to taxation. The first relates to the privilege of renting tangible personal property within the state. The second relates to the privilege of using bowling facilities (a unique combination of property and services) for recreational purposes. There are two entirely different taxpayers in each transaction; the proprietors in the first, his customers in the second. A sales tax is not a tax on property but rather an excise tax—a levy on certain transactions designated by statute. *Leonardson et al. v. Moon* et al., 92 Idaho 796, 451 P.2d 542 (1969). There is no double taxation when two separate and distinct privileges are being taxed even though the subject matter to which each separate transaction pertains may be identical. In *Lakewood Lanes, Inc. v. State of Washington*, 61 Wash.2d 751, 380 P.2d 466, 100 A.L.R.2d 1108 (1963) the Washington Supreme Court recognized that *where there are two separate taxpayers and two separate transactions, even though both involved the identical subject matter, each of the transactions had a distinct taxable significance thus removing any taint of double taxation. It is the retail sale that is taxed, not the article.* (Emphasis added.)

Although the imposition of tax on sales of [Redacted] is not at issue in this case, the Commission notes that at least one court has held that this is the sale of an amusement service. See *P & P Enterprises v. Celauro*, 733 S.W.2d 878 (1987).

The taxpayer also asserts that a Commission employee informed her several years ago that she was in the business of renting tangible personal property and could purchase [Redacted] for resale. This statement was not in writing. The employee no longer works for the Commission and is not available to comment on the taxpayer's assertion. Nevertheless, the Idaho Supreme Court has held that "the government is not estopped by previous acts or conduct of its agents with reference to the determination of tax liabilities or by failure to collect the tax, nor will the mistakes or misinformation of its officers estop it from collecting the tax." *State Tax Commission v. Johnson*, 75 Idaho 105, 269 P.2d 1080 (1954); *State ex rel. Williams v. Adams,* 90 Idaho 195, 409 P.2d 415 (1965).

Finally, the taxpayer stated that the deficiency included tax on several purchases that the auditor deemed to be computer leases. The taxpayer stated that these were actually payments to an internet service provider for internet access. The Commission agrees to delete these items from the deficiency. The Commission also will waive the negligence penalty in this case. The Notice of Deficiency Determination will be modified to reflect these changes.

WHEREFORE, the Notice of Deficiency Determination dated July 14, 2004, as adjusted, is APPROVED, AFFIRMED and MADE FINAL.

IT IS ORDERED and THIS DOES ORDER that the taxpayer pay the following tax and interest:

TAX	INTEREST	TOTAL
$1,632	$ 229	$ 1,861

Interest is calculated through May 15, 2005, and will continue to accrue at the rate set forth in Idaho Code section 63-3045(6) until paid.

DEMAND for immediate payment of the foregoing amount is hereby made and given.

An explanation of the taxpayer's right to appeal this decision is included with this decision.

DATED this ____ day of _____, 2005.

IDAHO STATE TAX COMMISSION

_____
COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of _____, 2005, a copy of the within and foregoing DECISION was served by sending the same by United States mail, postage prepaid, in an envelope addressed to:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Receipt No.

_____